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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 497

MICHIGAN BELL TELEPHONE COMPANY,
Appellant,
vs.
CITY OF DETROIT,
Appellee

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS

Appellee, pursuant to Rule 16, moves this Court to dismiss the appeal on the ground that the judgment rests on an adequate non-Federal Basis.

STATEMENT

The City of Detroit undertook the rehabilitation of a blighted area, known as the West Side Industrial Project, pursuant to Act 344 of the Public Acts of 1945, as amended, (Mich. Comp. Laws, §§125.71 *et seq.*; Mich. Stat. Ann. §§5.3501, *et seq.*). The Development Plan for the rehabilitation of this blighted area provided, among other things, for the acquisition by the City of approximately 73 acres of land containing 424 structures, the demolition of these structures, street widening and paving, the installation of sidewalks, sewers and water mains, rezoning, the vacation of certain streets and alleys, and the rerouting of certain utilities to other streets and alleys provided in the Development Plan. Streets and alleys in which Appellant had equipment were sought by the City to be vacated in carrying out the Development Plan. Appellant claimed from the City the costs of relocating its equipment from the vacated streets and alleys to other streets and alleys in the development area. The Michigan Supreme Court disallowed its claim and held in favor of the City.

ARGUMENT

THE JUDGMENT OF THE MICHIGAN SUPREME COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

In undertaking the rehabilitation of this blighted area under Act 344, *supra,* the City of Detroit was engaged in a governmental function providing for the protection of the public health, safety, morals and general welfare. The correction of outmoded street patterns and alleys and the relocation of utilities therefrom was an essential part of the Development Plan. *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

Appellant maintained its facilities in these streets and alleys subject at all times to an obligation to relocate at its own expense whenever the City undertook a function which was necessary to protect the public health, safety, morals and general welfare.

Berman v. Parker, supra;
New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 195 U.S. 453, 25 S.Ct. 471, 49 L. Ed. 831 (1905);
New York Tunnel Authority v. Consolidated Edison Co., 295 N.Y. 467, 68 N.E. 2d 445 (1946);
First National Bank of Boston v. Maine Turnpike Authority, 153 Me. 131, 136 A.2d 699 (1957);
The Port of New York Authority v. Hackensack Water Company, 41 N.J. 90, 195 A.2d 1 (1963);
Detroit Edison Company v. Detroit, 332 Mich. 348, 51 N.W. 2d 245 (1952).

The application of the rule stated in these cases is not confined to relocation within the same streets and alleys, but is equally applicable when streets and alleys are vacated.

Scranton Gas & Water Co. v. City of Scranton, 214 Pa. 586, 64 A. 84 (1906);
Southern Bell Telephone and Telegraph Company v. State of Florida, 75 So. 2d 796 (1954);
Department of Highways v. Southwestern Electric Power Co., 243 La. 564, 145 So. 2d 312 (1962);
City of Baltimore, et al. v. Baltimore Gas and Electric Company, et al., 192 A. 2d 87 (1963).

Appellant's right to use the streets and alleys of the City of Detroit was not abrogated. The Development Plan

provided another public place in which Appellant could and did relocate (Appellant's Appendix B, Pages 47 and 48.)

Appellant treated the statute in question only incidentally in the Michigan Supreme Court. In its Opinion, the Court stated (Appellant's Appendix B, Page 48):

> "The opinion of Mr. Justice O'Hara, affirming the trial court judgment, is grounded upon a construction of the plat act. We counter this rationale herein, although other points in his opinion might be considered more dispositive of the case, had he written for reversal as we do. Both utilities advert to the plat act in a manner as follows. Michigan Bell says that, although the trial court did not reach the proposition, it is entitled to prevail 'for the additional reason' that the plat act requires reservation of 'easements' and, Michigan Bell adds, that in lieu thereof it is entitled to reimbursements for the costs of relocation. In similar, but even briefer statement, Detroit Edison asserts that reservation of the 'easements' is required under the act; however, it does not assert in its brief that alternatively relocation costs are required by the act. Significantly, the act itself makes no mention of relocation costs."

Wherefore, Appellee prays that the appeal be dismissed.

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Dated: September 13, 1965.

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REPLY BRIEF FOR THE APPELLANT

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In the Matter of the Petition of the City of Detroit for the Vacation of Certain Plats, Streets and Alleys

MICHIGAN BELL TELEPHONE COMPANY,
Appellant,
vs.
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Appellee

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS

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Appellant, Michigan Bell Telephone Company, for its reply to the "Motion To Dismiss" filed by the City of Detroit, Appellee, respectfully represents that the Michigan Supreme Court judgment which is the subject of appeal necessarily decided the Federal constitutional issue presented by Appellant and there is no other substantive or adequate non-federal basis for sustaining the decision.

The minority opinion posed the question: "Is what the city proposes here a valid exercise of regulatory police

power or is it an unconstitutional taking of property?" (Jurisdictional Statement, pg. 43.) The majority opinion of the Court disagreed with the reasoning of the minority and held that the city did what the two statutes involved permitted. In so ruling the majority of the Court concluded "that the statutes are *in pari materia* and should be so construed." (Jurisdictional Statement, pg. 50.)

The Michigan Supreme Court Erroneously Approved and Authorized an Unconstitutional Taking of Appellant's Property

This proposition seems apparent. The City of Detroit made the attempt to evade and avoid the mandatory provisions of Act 344, PA 1945 as amended, (CL §125.71, et seq., MSA §5.3501, et seq.) and the federal constitutional guarantees. It did not join Appellant in the condemnation proceedings to acquire the property involved. After completing the condemnation proceedings as filed the City then proceeded under the Plat Act (Act 172 PA 1929, as amended by Act 101 PA 1958, MSA 1963, Supp. 26.492) to vacate the streets and alleys. By the latter proceeding it sought to eliminate Appellant's vested property rights without compensation. This the Michigan Supreme Court has approved and authorized through strained construction and interpretation of the statutes and denial of the federal constitutional guarantees.

By Sec. 3 of Act 344, the city is granted the power to *"acquire real property by purchase, gift, exchange or condemnation."* By Sec. 2, "real property" shall include *"all easements, franchises * * *, and every estate interest, privilege, easement, franchise and right therein, or appurtenant thereto, legal or equitable, including rights of way."* By Sec. 4(c) it is mandatory that "costs" include *"locating or relocating water mains, sewers, or other public or private utilities"* (emphasis supplied).

It is apparent that neither Act 344 nor the Plat Act authorizes the course of action employed by the city in attempting to eliminate the property rights of appellant without compensation. In the absence of Act 344 the city could not acquire or eliminate any property rights for the purposes there set forth. Under the statute it is expressly provided that the city's sole power and authority is to "acquire" property rights for such purposes *"by purchase, gift, exchange or condemnation"* which requires payment of compensation (emphasis supplied).

By strained construction of both statutes particularly the Plat Act; and notwithstanding the clearly expressed provisions of Act 344 the majority opinion of the Michigan Supreme Court reaches an unconstitutional result in permitting the city—

(a) to include in the "estimated cost of the improvements" the city's costs of "locating and relocating water mains and sewers, and to arbitrarily and unilaterally exclude from such costs the costs of "locating and relocating * * * other private or public utilities."

(b) to eliminate and destroy (not acquire) the property rights of utilities without "purchase" or "condemnation."

We submit that *if* the statutes *properly construed and applied* authorize what the Michigan Supreme Court has approved, then the statutes are unconstitutional. If these statutes do not authorize such result, then the Court's interpretation results in an unconstitutional taking and is an adverse decision on the constitutional issue.

Under any interpretation of the majority decision of the Michigan Supreme Court a most fundamental federal constitutional issue is presented by this appeal. The decision is contrary to long established law. The Court did not men-

tion or reveal any intention to modify or reverse its unanimous decision in *In Re Brewster Street Housing Site*, (1939) 291 Mich. 313, 342, where it was said:

> "Where property is taken for public health and safety, it cannot be taken without compensation, and there is no distinction between the power of eminent domain and the police power in this regard."

None of the cases cited by the city in its motion involved a vested property right taken without compensation under statutes containing provisions such as Act 344 and the Plat Act. None of the cases go as far as the decision of the Michigan Supreme Court here involved which authorizes the taking of property under the guise of police power regulation. Such is not regulation. It is confiscation.

CONCLUSION

For the reasons stated the Motion to Dismiss should be denied and the judgment below reversed.

Respectfully submitted,

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